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Supreme Court, U.S.
FILED
MAY 2 3 2003
OFFICE OF THE CLERK

No. 02-1225

In the Supreme Court of the United States

JACK WILLIAM TOCCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR THE PETITIONER

The government, on page six of its Brief in Opposition, notes that this petition is one of three petitions now pending before this court that raise the deepening and persistent split of authority in the circuit courts over procedure and practice in resentencing and sentencing appeals. *See, Donato v. United States,* No. 02-1191 (Petition for Certiorari filed February 6, 2003) and *Robison v. United States,* No. 02-9096 (Petition for Certiorari filed February 12, 2003). Each petition is from a circuit that follows the minority rule permitting de novo resentencing unless otherwise ordered.

The instant petition is distinctly different from the petitions in *Donato* and *Robison* for two reasons: (1) this petition is the only petition of the three which squarely presents the split in the circuits regarding whether second sentencing appeals are limited by the "law of the case" to the issues raised in the first appeal and (2) this petition opposes de novo resentencing. If the Court wishes to resolve whether the law of the case applies to second sentencing appeals, as well as consider opposing arguments from defendants as to whether resentencing is presumptively de novo, this Court should grant all three petitions and consolidate for argument.

In the instant case, a petition from the Sixth Circuit in a case where the government appealed a sentence, the petitioner asks this Court to impose as uniform rules for the circuits the rules followed in the majority of the circuits, but not followed in the Sixth Circuit: (1) resentencing is not presumptively de novo and (2) new issues cannot be raised in a second sentencing appeal if they could have been raised in the first appeal. The Sixth Circuit held that the government could relitigate sentencing issues at a second sentencing, and

granted relief to the government on new issues raised for the first time in the second sentencing appeal. The ruling of the Sixth Circuit is consistent with the rules it normally follows in sentencing appeals.

In *Donato* and *Robison,* petitions from the Second and Ninth Circuits in cases where the defendants sought review of their sentences, the petitioners ask this Court to impose as a uniform rule the rule followed by the minority of circuits, and usually followed in the Second and Ninth Circuits: resentencing is presumptively de novo. In *Donato* and *Robison*, the lower court denied de novo resentencing to the defendants. The denial of de novo resentencing in *Donato* and *Robison* is contrary to the rule those two circuits normally follow. *Donato* and *Robison* not only present the split of authority between the circuit courts, they also illustrate that the rules governing resentencing and sentencing appeals are not uniform within a circuit.

The split of authority in the circuit courts over whether second sentencing appeals are limited by the issues raised in the first sentencing appeal, limited by the law of the case, was raised as a principal reason for granting this Writ in the Petition. Nonetheless, although the government asks this court not to resolve the split of the circuits concerning whether resentencing is de novo, the government does not take a position on the resolution of the split of the circuits regarding what issues can be raised in second sentencing appeals. The Sixth Circuit is one of only four circuits that do not apply the law of the case to a second sentencing appeal to bar issues that could have been raised in the first appeal. *See, United States v. Hebeka,* 89 F. 3d 279, 284 (6th Cir.), cert. den. 519 U.S. 999 (1996), and cases cited at Pet., p. 9. Eight circuits do apply the law of the case to second sentencing appeals, see cases discussed at Pet., pp.6-7. The government

states no position on adoption of the rule in *United States v. Ticchiarelli,* 171 F.3d 24, 28-29 (1st Cir.) cert. den. 528 U.S. 850 (1999), that a judge's sentencing decision "unchallenged in a subsequent appeal despite the ample opportunity to do so" cannot be challenged in a second sentencing appeal because "the aggrieved party is deemed to have forfeited any right to challenge that particular decision at a subsequent date." The government apparently does not disagree that this rule promotes "the proper working relationships between trial and appellate courts * * * *" This rule should have been applied to the government's appeal by the Sixth Circuit.

The government suggests in its Brief that granting this petition would make no difference in the petitioner's case. Nothing could be farther from the truth. Since it was the government who brought both the first and second sentencing appeals in this case, it is the petitioner who is profoundly affected by the fact that the Sixth Circuit did not follow the rule of the majority of the circuits, and granted relief to the government on three, new sentencing issues in the second appeal that could have been raised in the first sentencing appeal but were not: The Sixth Circuit ordered recalculation of the petitioner's guidelines for his Count 6 conviction, which was not challenged by the government or ruled on by the court in the first appeal, and the Sixth Circuit ordered two, new enhancements for the petitioner's leadership role, despite the fact that the government had sought only one enhancement in the first appeal, and the court had ordered that enhancement at resentencing. In granting relief to the government in the second appeal, the Sixth Circuit, like the government in its Brief in Opposition, refused to address the arguments of petitioner, supported by cases in other circuits and clearly raised in his brief on appeal, reply brief, and motion for rehearing, that a circuit court cannot consider in a second appeal challenges to the trial court's sentence by the

government that could have been raised in the first appeal but were not.

The government argues in its Brief that since the Sixth Circuit found that petitioner's first sentencing reversal resulted in a limited remand and that the district court followed the remand, the question of whether the petitioner was harmed by de novo resentencing is not appropriately presented in this case because it is "factbound." First, this argument ignores the petitioner's principal argument that it was primarily the consideration of new sentencing issues in the second appeal, contrary to the rule of other circuits, that aggrieved the petitioner, not de novo resentencing per se. Second, this argument ignores the actual holding of the Sixth Circuit that upheld a de novo resentencing. The Sixth Circuit found that although the first panel found no error in failing to find the petitioner responsible for certain acts of racketeering in the RICO conspiracy in Count One, and no error in departing downward, the court's "limited" remand to make further findings and reconsider the downward departure permitted the district court to completely reconsider the calculation of the sentencing guidelines for petitioner's conviction in Count One, and completely reconsider all downward departures. See, App. B, p. 28a-31a. In other words, the Sixth Circuit found that the opinion of the first panel permitted de novo review of the calculation of the sentencing guidelines for Count One and de novo review of the downward departures, not restricted by the law of the case or limited by the issues raised by the government in the first appeal.

The government also argues that the petitioner seeks review of an interlocutory decision of the Sixth Circuit, and notes that this court does not "ordinarily" review interlocutory opinions. This argument ignores the fact that

the remand in this case is with such explicit direction that the district court has virtually no discretion.[1] The issues raised in this petition involve the very power of the court to reverse and remand for reconsideration issues waived in a first appeal, and the issues are ripe for review and well presented by this case. The conflicts in the circuits regarding the presumptive scope of resentencing and the permissible scope of second sentencing appeals are most likely to be presented to this court in future cases which seek review of an order of the circuit court granting an improper remand to the court below.

Apparently the government, in opposing a grant of certiorari at this stage of the proceedings, believes that judicial economy would be promoted by requiring the petitioner to (1) go back to district court for resentencing, (2) place objections on the record to de novo resentencing and reconsideration of issues already decided at the first sentence and not appealed (objections that have already been overruled by the Sixth Circuit), (3) incur a *third* sentence to incarceration after being released from custody a *second* time, (4) appeal these same issues (already rejected by the Sixth Circuit) in a third appeal, and (5) apply for certiorari again.

[1] The court must add four levels for a leadership role to one of the underlying racketeering offenses attributable to the petitioner in Count One, must include the Edgewater Hotel conspiracy as a racketeering offense attributable to the petitioner in Count One, cannot hold the petitioner responsible for an alleged murder conspiracy, must include the Hobbs Act conspiracy as a racketeering offense attributable to the petitioner in Count One, must find the petitioner responsible for at least one act of extortion in Count One, must attribute an extortion offense to the defendant in Count Six, and must add two levels to any extortion offense attributable to the defendant in Count Six. App. B, pp. 13a-14a, 16a, 18a, 23a, 24a-25a, 27a.

As this court has noted in opinions addressing the propriety of granting certiorari in cases that have ordered a remand, there is no rule prohibiting such a grant, although it may be a reason to deny certiorari. In this particular case, it makes no sense for the petitioner to have to jump through the five hoops listed above simply because the decision below remanded the case to the district court. The defendant in a criminal case has some interest in the finality of his sentence, despite the existence of the government's right to appeal. This court should not promote the years of appeals that the de novo resentencing rule produces. Waiting to review this case until after remand might result in a fourth sentencing proceeding for petitioner, which has happened before in de novo resentencing circuits (see argument below).

The government also argues that there need not be a uniform rule in the circuits regarding whether sentencing is de novo. As long as some circuits permit de novo resentencing, although most do not, and some circuits permit new issues to be raised in a second sentencing appeal, while most bar those issues if they could have been raised in the first appeal, there will be sentencing disparity throughout the circuits. If there is no uniform rule, the government will prevail as appellee in some circuits because the defendant is barred from de novo resentencing and cannot seek review of issues not raised in a first appeal, and the government will prevail as appellant in other circuits because the government is permitted to seek de novo resentencing and is able to raise new issues in a second appeal. Likewise, defendants will prevail as appellee in some circuits because the government cannot obtain de novo resentencing or raise new issues on appeal, and will prevail as appellant in other circuits because they obtain de novo resentencing and raise new issues on appeal. These disparate results do not arise from the way circuit courts craft their remand orders, or from the needs of various circuits for local

rules; rather, the disparate results result from several different rules being applied in several different circuits. The results of a sentencing appeal depend on where a defendant is sentenced.

Although the petitioners in *Donato* and *Robison* urge this court to adopt a de novo sentencing rule or presumption, this petitioner opposes such a rule because of its impact on the finality of sentence. De novo resentencing can result in negation of sentencing appeals, and multiple sentencing appeals. In *United States v. Duso,* 42 F. 3d 365, 368 (6th Cir. 1994), because resentencing was de novo, it was permissible for the district judge to recalculate the drug quantity and the applicable guidelines to increase the defendant's sentence to 41 months, after the court's upward departure to 36 months had been reversed in the first appeal. The circuit court on review of the second sentence stated that "rules of elemental fairness" may "someday" prevent such a result, but "someday" has not arrived yet in the Sixth Circuit. As noted in the petition, there has been at least one case in the Sixth Circuit and one in the Eighth Circuit, both de novo resentencing circuits, where the defendant has been sentenced four times. Pet., p. 13.

There are strong reasons why this Court should resolve these opposing rulings of the various circuits and create uniform rules prohibiting resentencing de novo as a general rule and limiting second sentencing appeals to issues raised in the first appeal which could have been raised. As noted by the *Donato* Petition and Reply Brief, this court has granted certiorari numerous times to secure uniform practice and procedure in federal courts. *Donato* Pet., pp. 12-13, Reply Brief, pp. 1-3. "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing * * * standards of procedure and

evidence," *McNabb v. United States,* 318 U.S. 332, 340 (1943).

Sentencing proceedings are an application of the principals of The Sentencing Reform Act and The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat 2011, enacted by Congress to promote uniformity in sentencing. Rules of the circuit courts that conflict and create disparity in sentencing results violate the purpose of this act.

Sentencing proceedings are governed by the Rules of the Court, particularly Fed. R. Crim. P. 32(f) and (h),[2] which govern objections made at sentencing or resentencing, and Rules 51[3] and 52,[4] regarding preserving claimed errors and plain error. Permitting a party at a second sentencing to challenge a ruling of the court that was identical to a ruling of the court at the first sentencing, but not objected to, violates Rule 32, unless sentencing is de novo in every instance. Permitting a party on appeal to raise an issue that could have been raised in the first appeal but was not, violates Rules 32, 51, and 52 if there was no objection to the trial court's ruling,

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[2] Fed. R. Crim. P. 32 provides in subsection (f) that objections to the calculations of the guidelines in a presentence report must be made within fourteen days after the parties receive the report. Subsection (g) of the same rule permits a new objection at sentencing for "good cause."

[3] Fed. R. Crim. P. 51 provides that a party may preserve a claim of error "by informing the court—when the court ruling is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection."

[4] Fed. R. Crim. P. 52 provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

and violates the "law of the case" doctrine which has been judicially developed to prevent repetitive relitigation.

The discretion of the circuit courts to enter appropriate remand orders created by Congress in 28 U.S.C. § 2106 and 18 U.S.C. § 3742 is not violated by this court's declaration of uniform, presumptive rules governing resentencing and sentencing appeals. If the court adopts as a uniform rule the majority rule that resentencing is not *presumptively* de novo, there is nothing to prevent circuit courts from finding in any particular case that resentencing is required to be de novo because of the vacation of some of the convictions of the defendant, or because the circumstances of the case require it. Likewise, if sentencing is not presumptively de novo, new issues may be raised at resentencing if there is "good cause" for new objections under Fed. R. Crim. P. 32. *See, e.g., United States v. McCoy (en banc),* 313 F. 3d 561 (D.C. Cir. 2002).

Application of the majority "law of the case" rule to second sentencing appeals will not completely prohibit new issues from being raised in second appeals under Fed. R. Crim. P. 52, where there is plain error affecting substantial rights. An exception to the law of the case doctrine is recognized by all courts that apply it where: (1) the evidence is substantially changed, (2) controlling authority has changed or (3) the decision was clearly erroneous and would work a manifest injustice. *See, e.g., United States v. Becerra,* 155 F. 3d 740, 752-753, (5th Cir. 1998).

CONCLUSION

For the foregoing reasons, as well as the reasons expressed in the petition, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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